ASIC
Australian Securities & Investments Commission

REPORT 156

Report on submissions to CP 102 Dispute resolution—review of RG 139 and RG 165

May 2009

About this report

This report highlights the key issues that arose out of the submissions received on Consultation Paper 102 *Dispute Resolution—review of RG 139 and RG 165* and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see Regulatory Guide 139 *Approval of external complaints resolution schemes* and Regulatory Guide 165 *Licensing: Internal and external dispute resolution*.

Contents

A Overview and consultation process

About our consultation

1 On 8 September 2008, we released Consultation Paper 102 *Dispute resolution—review of RG 139 and RG 165* (CP 102): see www.asic.gov.au/cp.

2 CP 102 sets out our proposals to improve complaints handling processes in the Australian financial services industry. In particular, CP 102 proposed to:

(a) refine the requirements for internal dispute resolution (IDR) procedures in line with the new Australian Standard on complaints handling (AS ISO 10002-2006);

(b) introduce a compensation cap on what ASIC-approved external dispute resolution (EDR) schemes can award and set a minimum compensation cap of $280,000 at this time; and

(c) harmonise EDR scheme Rules/Terms of Reference based on best practice to create a level playing field and equal treatment of complaints.

3 As part of our consultation, we:

(a) commissioned Newspoll Market Research and Ipsos-Eureka Social Research Institute to conduct independent research into consumer and investor satisfaction with IDR and EDR processes, the key findings of which were published in CP 102;

(b) met with consumer representatives, industry representative organisations and EDR schemes during a series of roundtable meetings; and

(c) met with representatives from professional indemnity (PI) insurers to consult on issues and concerns relating to our proposals to introduce a minimum compensation cap and the flow on effects for PI insurance (especially in the context of RG 126 *Compensation and insurance arrangements for AFS licensees*).

4 The consultation period for CP 102 closed on 7 November 2008. For a list of non-confidential responses to CP 102, see Appendix 1. Copies of these submissions are available at www.asic.gov.au/cp under CP 102.

5 This report highlights the key issues that arose out of the submissions received to CP 102 and our response to those issues.

6 This report is not meant to be a comprehensive summary of all responses received. It is also not meant to be a detailed report on every question posed for feedback in CP 102.

Financial Ombudsman Service

7 FOS formed from the merger of the Banking and Financial Services Ombudsman Limited (BFSO), the Financial Industry Complaints Service Limited (FICS) and the Insurance Ombudsman Service Limited (IOS). FOS commenced operations on 1 July 2008 and provides dispute resolution services for up to 80% of the Australian banking, insurance and investment disputes.[1]

8 On 1 January 2009, during our consultation, two more ASIC-approved EDR schemes also joined FOS, the Insurance Brokers Disputes Limited (IBDL) and the Credit Union Dispute Resolution Centre Pty Limited (CUDRC).

9 This consolidates the EDR scheme landscape to three ASIC-approved EDR schemes:

(a) the FOS;

(b) the Credit Ombudsman Service Limited (COSL); and

(c) the Financial Co-operative Dispute Resolution Scheme (FCDRS).

10 FOS will continue to operate the rules and procedures of the BFSO, FICS, IOS, IBDL and CUDRC. The intention of ASIC is that a single set of FOS Terms of Reference will be in place by 1 January 2010 and that the BFSO, FICS, IOS, IBDL and CUDRC will be wound down in due course.

11 On 18 August 2008, FOS released an Issues Paper about the development of a new, single set of Terms of Reference. Submissions closed on 10 October 2008 and 29 submissions were received.[2]

12 On 3 March 2009, FOS released an exposure draft of its new Terms of Reference for feedback, which has since been updated on 20 March 2009[3]. Submissions closed on 20 April 2009 and 36 submissions were received.

New licensees

13 We anticipate that the Australian Government's intention:

(a) to extend mandatory EDR scheme membership and licensing requirements to margin lenders and—under the national credit laws—to credit providers and those who provide credit related broking services and advice; and

(b) that these new licensees will also be subject to the IDR requirements,

may potentially raise new issues for dispute resolution in the Australian financial services industry.

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[1] Minister for Superannuation & Corporate Law Press Release No 45, 10 July 2008.
[2] Copies of submissions to the FOS Terms of Reference review can be viewed at: www.fos.org.au/centric/home_page/about_us/terms_of_reference_submissions.jsp.
[3] A copy of the exposure draft of the FOS Terms of Reference is available at: www.fos.org.au/centric/home_page/about_us/terms_of_reference_project_update_mar_2009.jsp.

14 We intend to update our regulatory guidance as necessary, in the light of these changes, in due course.

Responses to consultation

15 A total of 24 written submissions were received from a diverse range of stakeholders, including individuals, consumer representatives, licensees, financial industry associations and EDR schemes.

16 Table 1 provides a breakdown of the stakeholders from whom the 24 written submissions were received.

Table 1: Breakdown of stakeholders that made submissions

Stakeholder	No.
Individuals	2
Industry representatives (Including licensees (8), and financial industry associations (10))	18
Consumer representatives	9 (joint submission)
EDR schemes	3

17 By way of general observation, the submissions revealed differences in opinion about the role of EDR.

18 Submissions were often polarised on key issues, predominantly relating to our proposals around EDR scheme coverage—namely our proposals to replace monetary limits with compensation caps and if so, whether a complainant should be required to waive their rights to recover the excess in court, whether ASIC should prescribe a minimum compensation cap amount (at this stage $280,000) and whether interest should be awarded in addition to, or as part of, an EDR scheme award. Submissions were also polarised on the issue of whether EDR schemes should be required to publish an annual report about the number of complaints received and upheld for each scheme member.

19 Submissions generally agreed with and supported our proposals in relation to IDR and to harmonise EDR scheme Rules/Terms of Reference based on best practice to create a level playing field and equal treatment of complaints.

20 In this report, we have grouped comments from the submissions and our response to them based on the main issues raised by respondents:

(a) whether the definition of ‘complaint’ in AS ISO 10002-2006 should be adopted (see Section B);

(b) whether the Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 of AS ISO 10002-2006 should be adopted (see Section C);

(c) whether financial service providers should be required to provide a final response to a complaint within a maximum of 45 days, but within 30 days if possible (see Section D);

(d) what an EDR scheme must cover: SRG 139.34(a) (see Section E);

(e) whether EDR schemes should be required to operate compensation caps instead of monetary limits and require complainants to waive their right to pursue the balance of the claim elsewhere (see Section F);

(f) whether EDR schemes should be required to operate compensation caps that are consistent with the nature, extent and value of consumer transactions in the relevant industry. At this time, in CP 102, ASIC proposed that there should be a minimum compensation cap of $280,000 (see Section G);

(g) whether interest should be awarded in addition to an EDR scheme award for compensation (see Section H);

(h) whether schemes should be required to handle complaints where a member ceases to carry on business (see Section I);

(i) whether the time limit for bringing complaints to an EDR scheme should be six years from when the consumer or investor first became aware, or should reasonably have become aware, that they suffered the loss the complaint is about (see Section J);

(j) whether the meaning of ‘dealt with’ should be clarified for the exclusion from a scheme’s jurisdiction of complaints that are already dealt with in another forum (see Section K);

(k) whether EDR Schemes should be required to publish an annual report of information about complaints received and upheld against each member (see Section L); and

(l) whether there should be transitional arrangements for the introduction of new coverage guidelines and if so, the nature of an appropriate transitional time frame, as well as any other transitional arrangements (see Section M).

B IDR: Adopting the definition of 'complaint' in AS ISO 10002-2006

Key points

Most submissions supported our proposal to adopt the definition of 'complaint' in the new Australian complaints handling standard AS ISO 10002-2006.

Some submissions from industry expressed concern that the adoption of this definition would involve administrative burdens and unnecessary compliance costs if capturing and maintaining records for minor complaints were required.

To address these concerns, we have decided to adopt the definition of 'complaint' in AS ISO 10002-2006 and not require industry to apply the full internal dispute resolution (IDR) process for complaints that are resolved by the *end of the next business day* from which the complaint was received.

Where possible, we encourage financial service providers to capture and record all complaints regardless of the time frame they are resolved in. This is because having complete complaints data can be invaluable to improving products, services and business systems.

Our proposal

21 We proposed the adoption of the following definition of 'complaint' as set out in the Australian Standard AS ISO 10002-2006:

> An expression of dissatisfaction made to an organisation, related to its products or services, or the complaints handling process itself, where a response or resolution is explicitly or implicitly expected.

22 Under Superseded Regulatory Guide 165 (SRG 165) at RG 165.7, the term 'complaint' referred to any enquiry, complaint or dispute however defined, that may be dealt with under a given IDR procedure or by a particular EDR scheme.[4]

23 When SRG 165 was issued in November 2001, there was no consistent definition of complaint across the financial services sector (see SRG 165.7). SRG 165.7 flagged that ASIC would consult further about developing a definition of 'complaint' for the financial services sector.

24 We proposed the adoption of the AS ISO 10002-2006 definition of 'complaint' because:

[4] SRG 165 was the regulatory guide at the time of CP 102. The reissued RG 165 has been published on the same date as this report. Superseded regulatory guides remain accessible through the *ASIC Digest*.

(a) it removes the onus on consumers and investors to explicitly state that something is a complaint; and

(b) it promotes the more consistent treatment of complaints.

25 We also proposed the adoption of the AS ISO 10002-2006 definition of 'complaint' to prevent complaints from falling through the cracks due to lack of identification, as feedback from consumer representatives, as well as our own regulatory experience indicated that in some instances, complaints were not being promptly identified as complaints early enough in the complaints handling process.

26 The research conducted for ASIC also revealed that IDR that is easy to access and resolves complaints promptly generally leads to more satisfied consumers and investors.

Definition of 'complaint'

27 Most submissions agreed with this proposal. However a number of submissions from industry expressed concern that the adoption of this definition would result in significant administrative burdens or added compliance costs, particularly where the capturing and recording of minor 'expressions of dissatisfaction' is involved.

28 Consumer representatives commented that many financial service providers have already updated or are in the process of updating their complaints handling policies to incorporate the new definition. Therefore, any compliance costs incurred by industry would be minimal. This was confirmed by the submissions of a few industry members, who advised that they are already in the process of updating their complaints handling policies to adopt the new definition.

ASIC's response:

We have decided to:

- adopt the definition of 'complaint' in AS ISO 10002-2006; and
- NOT require financial service providers to apply the full IDR process (i.e. capturing and maintaining records of complaints) that are resolved *by the end of the next business day* from when the complaint was received.

This approach takes into account industry concerns about administrative burdens and compliance costs where capturing and maintaining records of minor expressions of dissatisfaction are involved.

This approach is also generally consistent with, although not identical to the approach adopted by the United Kingdom in Financial Services Authority (FSA) 'Dispute Resolution: Complaints' (DISP) module of the *FSA Handbook*: DISP Rule 1.5.1.

A similar approach is also proposed under the review of the EFT Code.

We also consider this approach will help to provide an incentive for financial service providers to focus on responding to and resolving less complex and less involved complaints more expeditiously.

However, where possible, we encourage financial service providers to capture and record all complaints regardless of what time frame they are resolved in. This is because having accurate and complete complaints data can be invaluable to improving products, services and business systems.

C IDR: Adopting the Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 of AS ISO 10002-2006

Key points

Most submissions supported our proposal to adopt the Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 of AS ISO 10002-2006.

Some submissions disagreed on the basis that AS ISO 10002-2006 should be adopted in full.

We have decided to require the adoption of the Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 in AS ISO 10002-2006. However, where possible, we strongly encourage financial service providers to adopt AS ISO 10002-2006 in its entirety.

Our proposal

29 We proposed that financial service providers in developing their IDR procedures, should be required to have regard to the Guiding Principles and the following Sections of AS ISO 10002-2006:

(a) Section 5.1—Commitment;

(b) Section 6.4—Resources;

(c) Section 8.1—Collection of Information; and

(d) Section 8.8—Analysis and evaluation of complaints.

30 We did not propose requiring IDR procedures to comply with AS ISO 10002-2006 in its entirety as this would be more prescriptive and less flexible than requiring IDR procedures to comply with the Guiding Principles and specific sections of AS ISO 10002-2006. Requiring the adoption of AS ISO 10002-2006 in full would also involve significant compliance costs for financial service providers.

Adopting the Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 of AS ISO 10002-2006

31 Most submissions agreed with our proposal on the basis that:

(a) it would be less of a compliance burden than adopting AS ISO 10002-2006 in full; and

(b) the Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 are the core requirements or fundamental elements for IDR procedures. Any

additional compliance should be determined and actioned by financial service providers.

32 Where submissions were of the view that AS ISO 10002-2006 should be adopted in its entirety, this was because:

(a) selective use of the standard by the financial services industry runs the risk of reducing the effectiveness of the program. It should be noted that arguments surrounding compliance costs ignore the fact that if business procedures, products and delivery systems are clear and not perceived to be misleading, then compliance costs will be substantially reduced;

(b) industry regards such statements of encouragement (to adopt the standard in its entirety where possible) as being 'soft law' and therefore required to be complied with. ASIC should take a prescriptive approach to the use of the standard and advocate its full use. This will reduce ambiguity surrounding ASIC's expectations;

(c) requiring the adoption of AS ISO 10002-2006 in its entirety would create a level playing field for all financial service providers; and

(d) as AS ISO 10002-2006 is outcomes focused and provides a degree of flexibility it would not be over-prescriptive to require the adoption of the standard in full.

33 In addition to Sections 5.1, 6.4, 8.1 and 8.8 of AS ISO 10002-2006:

(a) consumer representatives also recommended that if AS ISO 10002-2006 is not adopted in full, Section 7—should also be required to be adopted. This is because Section 7 gives appropriate and helpful guidance about how a complaint should be tracked and dealt with; and

(b) FOS also recommended that Section 8.6—Management review of the complaints-handling process should also be required to be adopted. This is because Section 8.6 is equivalent to the Essential Element 'Reviews' under AS 4269-1995.

ASIC's response:

We have decided to require the adoption of the Guiding Principles and Sections 5.1, 6.4, 8.1 and 8.8 of AS ISO 10002-2006. Where possible, we strongly encourage financial service providers to adopt AS ISO 10002-2006 in its entirety.

We consider this approach to be less prescriptive and more flexible than requiring IDR procedures to comply with AS ISO 10002-2006 in full. We also consider this approach to have less compliance costs for financial service providers.

We do not consider that we need to also require the adoption of Section 7—Operation of complaints-handling process as a core requirement. However, we encourage the tracking of complaints throughout the entire dispute resolution process as this will assist in providing a final response within 45 days: see Section D.

We do not consider that we need to also require the adoption of Section 8.6—Management review of the complaints-handling process. However, we encourage top management to review the complaints-handling process on a regular basis as this will assist in ensuring that IDR processes have sufficient resources and are working effectively and efficiently.

D Time frames at IDR

Key points

Most submissions broadly agreed or agreed in principle with our proposal to require financial service providers to provide a 'final response' to a complaint within a maximum of 45 days, but within 30 days if possible.

Some submissions expressed concern about having a shorter, *but within 30 days, if possible* time frame as this would cause confusion and false expectations for consumers, as well as make the 45-day time limit redundant.

A few other submissions expressed concern that it would not always be possible to give a 'final response' in 45 days, especially where complex complaints were involved.

To address these concerns, we have decided to

- require financial service providers to provide a 'final response' within 45 days to a complaint; and
- retain the proviso that if the financial service provider cannot provide a 'final response' within 45 days, the financial service provider must inform the complainant of the reasons for the delay and their right to refer the complaint to an EDR scheme.

Our proposal

34 We proposed that financial service providers should be required to provide a 'final response' to a complaint within a maximum of 45 days, but within 30 days if possible.

35 By 'final response', we proposed that financial service providers should be required to write to complainants within 45 days informing them of:

(a) the outcome of their complaint;

(b) their right to take their complaint to EDR; and

(c) the name and contact details of the relevant EDR scheme.

36 We also proposed that if the financial service provider could not give a 'final response' within 45 days, the financial service provider should inform the complainant of the reasons for the delay and their right to refer the complaint to an EDR scheme.

37 Under SRG 165, a financial service provider should 'substantially respond' to complaints within a maximum of 45 days, but within a shorter time frame if possible. If a financial service provider cannot respond within 45 days, it should inform the complainant of the reasons for the delay and their right to

refer the complaint to the EDR scheme (see SRG 165, 'IDR procedures and AS 4269-1995').

38 We proposed that a final response should be provided within 45 days, but within 30 days if possible because:

(a) timeliness is an important aspect of good complaints handling and is recognised as an Essential Element under AS 4269-1995 and as a Guiding Principle under AS ISO 10002-2006;

(b) IDR procedures must include clear response times for dealing with complaints and the complainant should be informed of these response times;

(c) the findings of independent research conducted for ASIC revealed that the timely resolution of complaints at IDR is important to consumer and investor satisfaction with IDR processes; and

(d) a number of industry codes of conduct already impose time frames for responding to complaints that aim for a shorter time frame than 45 days.

39 Table 2 provides a summary of shorter time frames that are required by industry codes of practice.

Table 2: Time frames for IDR in industry codes

Industry Code of Practice	Aim	Time limit
Electronic Funds Transfer Code of Practice	21 days	45 days
Mutual Code of Practice Note: This Code comes into effect on 1 May 2009	21 days	45 days
Code of Banking Practice	21 days	45 days
General Insurance Code of Practice	15 business days*	Agreed reasonable alternative*
General Insurance Brokers' Code of Practice	20 business days*	Alternative time frame if agreed*

*Two-tied IDR approach: the same period applies at both tier 1 and tier 2. For example, for a complaint to which the General Insurance Code of Practice applies: at tier 1, the financial services provider should aim to handle the complaint within 15 business days or within the agreed reasonable alternative time frame. If the complaint escalates to tier 2, the same time frames apply as for tier 1.

40 It should be noted that this proposal will not affect:

(a) the maximum 90-day time limit applicable to complaints about superannuation where either s101 of the *Superannuation Industry (Supervision) Act 1993* (Cth) or s47 of the *Retirement Savings Accounts Act 1997* (Cth) applies; nor

(b) the time frames imposed by industry codes of practice (summarised at Table 2).

41 Under SRG 165, financial service providers are also required to take time frames imposed by industry codes of practice into account (see Schedule to SRG 165).

Time frames at IDR

42 Most submissions broadly agreed or agreed in principle with this proposal.

43 Consumer representatives supported this proposal and were in favour of adopting a 'final response', as this would inform consumers and investors of the right to complain, the right to proceed to EDR and the contact details of the relevant EDR scheme, which would generally improve the linkage between IDR and EDR.

44 A few submissions from financial industry associations expressed concern about having to give a 'final response' within 45 days and were in favour of retaining the current requirement to provide a 'substantial response' as it may not always be possible to give a final response despite using best efforts.

45 Some submissions from industry were critical of providing two time frames, including a time frame that is 'if possible', as this would create confusion and false expectations for consumers, as well as make the 45-day time limit redundant.

46 A few industry submissions were critical of having a rigid time frame and emphasised the need for a *flexible* approach to avoid errors in the process due to insufficient facts and information, and also to deal with more complex complaints. So as to promote flexibility, a few industry submissions also recommended that if the 45 days lapse, the financial service provider should provide an update or status report to the complainant.

47 A few other industry submissions recommended that the 45 days should restart where there has been a substantial change to the nature of the complaint, for example where new information is provided.

48 A few industry submissions also suggested that the requirement to give a 'final response' in *writing* should be changed to *contact* so as to enable communication by various other means, for example over the telephone.

ASIC's response:

We have decided to:

- require financial service providers to provide a 'final response' within 45 days to a complaint; and

- retain the proviso that if the financial service provider cannot provide a 'final response' within 45 days, the financial service provider must inform the complainant of the reasons for the delay and their right to refer the complaint to an EDR scheme.

We have decided not to retain the requirement of providing a 'final response … but if possible, within 30 days' as many industry codes already aim for a shorter time frame than 45 days: see Table 2.

This approach also addresses industry's concerns that an 'if possible' time frame would cause confusion and false expectations for consumers, as well as make the 45 day time limit redundant.

We do not consider that providing a 'final response' within 45 days will be inflexible, particularly where complex complaints are involved as financial service providers will be required to handle the complaint to try and resolve it genuinely and in good faith within the 45 days. However, if this is not possible, the financial service provider should:

- inform the complainant providing reasons for the delay (a status report of sorts); and
- advise the complainant of their right to refer the complaint to an EDR scheme.

We believe this will improve accessibility to EDR schemes, as consumers will be more aware of their right to complain and the appropriate body to complain to. It may also allow IDR to run its course because when the complainant is made aware of the reasons for delay, they may not refer the complaint to EDR.

We also believe this approach will encourage financial service providers to ensure that they have sufficient facts and information to handle the complaint early in the IDR process and to consider ways to improve their handling of complex complaints, so errors in complaints handling can be avoided.

We do not consider that the 45-day time frame should recommence where new information is provided. To do so would effectively enable a limitless IDR process and undermine the objective of all parties providing all relevant information in good faith at an early stage of IDR.

We also do not consider that providing a final response in writing is inflexible, as 'in writing' includes communications by email.

E Coverage of an EDR scheme: SRG 139.34(a)

Key points

Most submissions agreed with our proposal to:

- clarify that coverage of an EDR scheme must be sufficient to deal with the majority of types of consumer complaints in the relevant industry (or industries); and
- remove the requirement that coverage also extend to the whole of each complaint.

We have decided to require that EDR schemes cover the 'vast majority' of consumer complaints in the relevant industry (or industries) in respect of types of complaints and remove the requirement that coverage also extend to the whole of each complaint.

Our proposal

49 We proposed to clarify Superseded Regulatory Guide 139 (SRG 139) at SRG 139.34(a) to make it clear that coverage of a scheme must be sufficient to deal with the majority of *types* of consumer complaints in the relevant industry (or industries).[5]

50 We also proposed to remove the requirement that coverage also extend to the *whole of each complaint* in SRG 139.34(a), given we proposed to enable consumers and investors with a complaint that exceeds the compensation cap to waive the excess (See Section F).

Coverage of an EDR scheme: SRG 139.34(a)

51 Most submissions agreed with this proposal.

52 Of the stakeholders who agreed with this proposal:

(a) one EDR scheme sought additional clarification of the meaning of 'majority'; and

(b) another EDR scheme expressed the view that ASIC's regulatory guidance should give an extensive overview of the types or categories of complaint that fall within the scheme's jurisdiction.

[5] SRG 139 was the regulatory guide at the time of CP 102. The reissued RG 139 has been published on the same date as this report. Superseded regulatory guides remain accessible through the *ASIC Digest*.

53 The few submissions that disagreed with this proposal were in favour of retaining monetary limits so coverage should be for the majority of types of complaints in the relevant industry (or industries) that fall within the monetary limit.

54 Consumer representatives recommended that EDR scheme coverage should be for virtually all consumer complaints unless there are compelling reasons why an area of dispute should be excluded. To enable this, consumer representatives were of the view that EDR scheme coverage should be for the 'vast majority' (i.e. 90%) of complaints in terms of both (a) types of complaint and (b) numbers of complaints.

55 Consumer representatives were also of the view that the words *and the whole of each complaint* should be retained as it is essential for EDR schemes to make a full and comprehensive decision in respect of a complaint.

56 COSL on the other hand, expressed the view that in order to improve scheme accessibility, there should be a presumption of coverage so SRG 139.34(a) should state that EDR schemes should cover *all consumer complaints within the relevant industry and the whole of each complaint subject only to specific exclusions.*

ASIC's response:

We have decided to require EDR schemes to:

- cover the *vast majority* of consumer complaints in the relevant industry (or industries) in respect of types of complaints; and
- remove the requirement that coverage also extend to the whole of each complaint.

We are of the view that the 'vast majority' of types of complaints in the relevant industry (or industries) is the most appropriate test for EDR scheme coverage as coverage should be for virtually all consumer complaints in order to improve access to the schemes.

Adopting a 'vast majority' test also aligns with our proposal to reformulate SRG 139.34(b) so that compensation caps are set at a level that reflect the value of the vast majority of consumer transactions in the relevant industry (or industries): see Section G.

We do not consider it preferable to give an extensive overview of the types or categories of complaint that fall within the scheme's jurisdiction nor adopt a presumption of coverage unless specific exclusions apply as both require a prescriptive list of types of complaint that may require constant updating as new financial products and services are developed.

We are of the view that the requirement for coverage to also extend to the whole of each complaint should be removed given our proposal to replace monetary limits with compensation caps. We do however encourage EDR schemes to cover all the issues involved in a complaint as this ensures the effectiveness of the scheme.

F EDR: Replacing monetary limits with compensation caps, and waiver

Key points

Submissions were strongly divided on whether monetary limits should be replaced by compensation caps.

Submissions were also equally divided on whether a complainant should be required to waive the balance of their claim at EDR and when waiver of the excess should occur.

We have decided to:

- replace monetary limits with compensation caps; and
- allow EDR schemes to require complainants to waive their rights to pursue the balance of the claim in another forum if they accept the final outcome at EDR (i.e. waiver at the end of the EDR process).

Our proposal

57 In CP 102, we proposed that:

(a) monetary limits should be replaced with caps on the amount of compensation each EDR scheme can award; and

(b) a consumer or investor with a complaint involving an amount that is higher than a scheme's compensation cap should be permitted to waive the excess in order to access the scheme.

58 This proposal is in line with recommendation 9.2 of the Productivity Commission's *Review of Australia's Consumer Policy Framework* (May 2008).

59 Under our proposed approach:

(a) the EDR scheme would be able to handle the complaint and make an award up to its compensation cap (or higher if the member agreed);

(b) a consumer or investor with a complaint involving an amount that is higher than the EDR scheme's compensation cap would be required to waive the excess; and

(c) the EDR outcome would not bind the consumer or investor if they did not choose to accept it. However, if the complainant accepted the EDR outcome, the scheme or member could require the complainant to accept the EDR outcome as full and final satisfaction of their claim and it would be binding on both parties (i.e. the balance of the claim could not be pursued in another forum, such as a court).

60 Currently, only one scheme, COSL, operates along the lines of a compensation cap and waiver. The remaining schemes, FOS and FCDRS, use a monetary limit, so that only complaints that relate to an issue below the maximum *value of a claim* can be handled by these schemes.

61 We proposed that monetary limits should be replaced with compensation caps and that a consumer or investor should be permitted to waive the excess of their claim to access the scheme because:

(a) it provides greater access to EDR for consumers and investors, especially those with a claim just above the monetary limit who would have been precluded from accessing the scheme; and

(b) it removes the need for EDR schemes to expend significant resources determining jurisdiction before the substance of a claim can be considered.

Replacing monetary limits with compensation caps, and waiver

62 This proposal elicited strongly divided opinions, with most industry submissions strongly opposing the proposed change, or only partially supporting it. Other industry submissions supported the introduction of compensation caps.

63 The reasons cited by industry for not supporting a move to compensation caps included concerns about:

(a) an increase in frivolous or vexatious claims that would be more appropriately dealt with in court;

(b) consumers 'shopping around' and using EDR schemes as a 'dry run' or 'free discovery' service before going to court or to delay court proceedings;

(c) the increasing costs of EDR due to more cases falling within the jurisdiction of the scheme; and

(d) unnecessary pressure placed on the PI insurance market, leading to increased premiums and reduced availability of appropriate cover.

64 Consumer representatives and one EDR scheme on the other hand, strongly supported replacing monetary limits with compensation caps as this approach would be more flexible and would ensure that more consumers have the option of making a complaint to an EDR scheme, thereby improving accessibility. This approach would also significantly improve efficiency as it would help reduce the amount of time taken to resolve jurisdictional issues about whether the complaint fits within the monetary limit.

65 COSL advised that in operating a compensation cap, it does not spend significant time and resources determining whether a complaint falls within

its monetary limit before it is able to consider the actual merits of the complaint.[6]

66 The industry submissions in support of compensation caps, were supportive only on the basis that if the consumer accepted the scheme's decision, it would be binding, in full and final settlement of the claim and the consumer would lose any right to pursue the balance of the claim in court.

67 Consumer representatives cautioned that while a Deed of Release could be signed enabling waiver of the excess along the same lines that COSL currently operates, this should not preclude a complainant from choosing to reject the EDR outcome and pursue their entire claim in court. This is because consumers who access EDR schemes should not be denied their legal rights to take a matter to court and EDR schemes were designed to increase access to justice, not to significantly reduce it.

68 Consumer representatives also considered it very unlikely that consumers would use EDR schemes as a 'dry run' before going to court, because of the length of time involved (extending to 18 months at EDR, followed by two to five years in court), the exposure to high legal costs and the potential for an adverse outcome.[7]

69 COSL also noted that they have not come across a situation where the consumer has conducted a dry run at EDR and then refused to accept the EDR scheme's decision, preferring to litigate the whole claim in court:

> Quite frankly, such strategies are beyond the resources of almost all consumers whose complaints COSL resolves.[8]

70 Of the submissions that supported waiving the excess, a few gave their support on the basis that waiver should be a condition precedent of accessing the scheme (i.e. waiver would be required before the scheme is able to handle the complaint).

71 Waiver at the beginning of EDR would also address some industry concerns about complainants conducting dry-runs.

72 COSL also advised that in their view, the provision for waiver (or a complainant being able to abandon the excess) goes a long way to making COSL more accessible.[9]

ASIC's response:

We have decided to:

- replace monetary limits with compensation caps; and

[6] COSL's submission to CP 102, p 18.
[7] Joint consumer submission to CP 102, p 11.
[8] COSL's submission to CP 102, p 21.
[9] COSL's submission to CP 102, p 19.

- allow EDR schemes to require complainants to waive their rights to pursue the balance of the claim in another forum if they accept the final outcome at EDR (i.e. waiver at the end of the EDR process).

We are of the view that this approach will save schemes significant time and resources in determining initial threshold/ jurisdictional issues, (i.e. whether the complaint falls within the scheme's monetary limit) before the substance of the complaint can be considered. This will assist in the expeditious handling of complaints.

We also consider that any potential increase in costs to the scheme due to more complaints coming within jurisdiction, will be counter-balanced, if not counter-weighed, by reduced costs in determining jurisdiction. Furthermore, our proposed approach in relation to time limits for bringing a complaint to EDR, outlined in Section J, may also help to limit the number of complaints that may be brought to a scheme.

We have decided that waiver should not be at the beginning of the EDR process, and instead, should be at the end of the EDR process because:

- waiver at the end of the EDR process may act as an incentive for financial service providers to act in good faith and genuinely attempt to resolve the complaint in a timely and appropriate manner;
- waiver at the beginning of the EDR process would require a consumer to assess whether they wish to accept the EDR outcome before it is possible to do so; and
- waiver at the end of the EDR process does not interfere with a complainant's legal right to reject the EDR outcome and pursue their entire complaint in a court of competent jurisdiction.

We believe this approach will not result in an increase in vexatious claims as we are not aware of any correlation between vexatious claims and higher monetary amounts involved in a claim. Furthermore, a scheme may continue to exclude claims that are frivolous or vexatious under its Rules or Terms of Reference.

We also do not consider that this approach will result in complainants using EDR schemes to 'shop around' and as a 'dry run' or 'free discovery' service before going to court or to delay court proceedings. Our feedback from consumer representatives and COSL, as well as our own regulatory experience indicates that it is highly unlikely that a complainant will use EDR in this manner. This is because of the length of time involved in going to EDR and then court, the exposure to high legal costs and the potential for an adverse outcome. It would also take a particularly tenacious and unrelenting complainant to pursue not only IDR and EDR, but also to go to court.

In relation to concerns about unnecessary pressure being placed on the availability and affordability of PI insurance, we do not consider this to be a reason of itself for not setting a higher standard of consumer protection. This is a view shared by the Productivity Commission in its *Review of Australia's Consumer Policy Framework*.

We discuss our approach to PI insurance further in Section G.

G EDR: Setting a compensation cap of a minimum $280,000 at this time

Key points

Submissions were strongly divided on whether ASIC should stipulate a minimum compensation cap of $280,000 at this time.

We have decided to require EDR schemes to operate a minimum compensation cap of $280,000, and to the extent that insurance brokers are covered by the scheme, a minimum compensation cap of $150,000, at this time for claims that meet the value of the retail client test (currently $500,000).

Our proposal

73 We proposed to reformulate our guidance in SRG 139.34(b) so that EDR schemes will be required to operate compensation caps that are consistent with the nature, extent and value of consumer transactions in the relevant industry or industries. We proposed that at this time, we were of the view that the compensation cap should be a minimum of $280,000 across the Australian financial services industry.

74 Under SRG 139.34(b), schemes are required to ensure that their coverage is sufficient to deal with

> … consumer complaints involving monetary amounts up to a specified maximum that is consistent with the nature, extent and value of consumer transactions in the relevant industry or industries.

75 This currently involves schemes operating differential monetary limits ranging from $100,000 to $280,000. Table 3 summarises the monetary limits applicable to each scheme.

Table 3: Monetary limits for disputes brought to EDR schemes

EDR scheme	Monetary limits
Credit Ombudsman Service Limited (COSL)	No monetary limit on claims. Complainants can be compensated up to **$250,000**
Financial Co-operative Dispute Resolution Scheme (FCDRS)	**$280,000**

EDR scheme	Monetary limits
Financial Ombudsman Service (FOS)	*Banking and finance division*: **$280,000** *Investments, life insurance and superannuation division*: • Complaints about lump sum life insurance products, including advice about these products: **$280,000** • Complaints about income stream life insurance products, including advice about these products: **$6,000 per month** • Complaints about investment advice: **$150,000** *General insurance division*: • Third party claims: **$3,000** • Other claims: **$280,000** *Mutuals division*: **$280,000** (previously heard by CUDRC) *Insurance brokers division*: **$100,000** (previously heard by IBDL)

76 ASIC's Deputy Chairman, Mr Jeremy Cooper, recently stated at the Joint Committee on Corporations and Financial Services, Canberra, that ASIC proposes to introduce a minimum compensation cap of $280,000. At the same forum, ASIC's Chairman, Mr Tony D'Aloisio commented that sometimes the erroneous assumption is made that the cap is from zero to $280,000, when the $280,000 is actually a limit on what could be unlimited liability in terms of recovery (28 November 2008).

77 We have also previously expressed our views on what we consider to be an appropriate monetary limit. In our submission to the 2007 review of FICS' monetary limits, we expressed the view that it was necessary to increase the monetary limits for all categories of complaints to FICS (now the Investments, Life Insurance and Superannuation division of FOS). ASIC supported increasing the monetary limits to $7,500 per month for complaints about income stream risk products and to $280,000 for complaints about lump sum life insurance and for all other complaints, including complaints about investment advice.

78 As a result of the review, FICS achieved increases to $280,000 for complaints about lump sum life insurance and $150,000 for other complaints, including complaints about investment advice.

79 We are also of the view that ASIC should prescribe a minimum compensation cap of $280,000 for schemes (except to the extent that they cover insurance brokers) for several reasons, including:

(a) a range of economic indicators show that the value of investments and assets held by consumers and investors has increased in recent years to levels significantly above the current ILIS monetary limits for investment advice complaints (one of two areas, along with complaints

about insurance brokers, where current monetary limits are significantly less than $280,000). For example:

- the levels of superannuation balances since 1992—
  – (in 2005/06, ASFA research found that the average superannuation payout for men was $136,000[10] and ASIC's 2006 shadow shopping study found that the average level of superannuation assets for consumers aged 50 years and over was $188,525;[11]
  – in July 2008, the average account balance of a self-managed superannuation fund (SMSF) was $756,000 and there were 378,656 funds. Approximately 55% of SMSFs (211,000) got advice from a licensed adviser and 74% of their assets were under advice;[12]
- the high mean value of investment portfolios across all investors ($321,500) as estimated by Australian investors when asked to estimate the current value of their investments, excluding their family home;[13]
- the amount households look to borrow to purchase a home: ranging between $370,000 and $500,000;[14] and
- the average loan size ($230,000) for first home buyers in 2007;[15] and

(b) there are a growing number of complaints falling outside the jurisdiction of the schemes under current monetary limits, particularly in relation to the ILIS division of FOS.

Setting a minimum compensation cap of $280,000 at this time

80 Submissions were polarised on whether ASIC should stipulate a minimum compensation cap of $280,000 at this time.

81 Industry submissions strongly opposed the introduction of a minimum compensation cap of $280,000 at this time and were in favour of retaining the current scheme differential limits: see Table 3.

82 The key reasons cited for industry's opposition included:

(a) the differences in complexity, technical differences and values of different types of products and services warrant specific approaches in terms of monetary limits for different segments of the financial services industry;

[10] ASFA, *Retirement savings update*, Feburary 2008.
[11] ASIC Report 69 *Shadow shopping survey on superannuation advice*, April 2006. The report is based on a survey of 306 consumers.
[12] See the Deputy Chairman of ASIC, Jeremy Cooper's address to the Insurance Council of Australia's 2009 Regulatory Update at the Four Seasons Hotel, Sydney, para 27, available at www.asic.gov.au/asic/pdflib.nsf/LookupByFileName/ICA-Speech-040209.pdf/$file/ICA-Speech-040209.pdf.
[13] ASIC Report 121 *Australian investors at a glance*, April 2008. The question posed to research participants was 'And what is the approximate value of your total investment portfolio (excluding your own home)?'
[14] The *Deloitte Australian Mortgage Report*, December 2008.
[15] ABS, *Housing Finance Australia*, November 2008, category 5609, ABS, *Australian Social Trends*, July 2008, category 4102.

(b) the current limits are more adequate and should be retained;

(c) imposing a minimum compensation cap of $280,000 is arbitrary and not supported by experience;

(d) concerns that it is inappropriate for the regulator to prescribe a minimum monetary limit. Instead monetary limits are matters which the scheme should prescribe; and

(e) PI insurance will not be available for intermediaries to cover claims at this level.

83 In relation to insurance brokers, the key reasons cited for opposing a minimum compensation cap of $280,000 at this time included:

(a) intermediaries are significantly different to other sectors of the financial services industry as they are not product producers and their expertise is in risk management and not savings and investment;

(b) the deeming provisions under s985B of the *Corporations Act 2001* (Cth) (Corporations Act), originating from the (now repealed) *Insurance (Agents and Brokers) Act 1984*, afford consumer protection in the context where an insurance broker liaises with a consumer and insurer; and

(c) such an increase is not warranted as it does not reflect the low value of claims referred to the IBDL, now the insurance brokers division of FOS.

84 Consumer representatives were strongly of the view that a minimum compensation cap of $280,000 is insufficient and the compensation cap should be increased progressively to:

(a) $350,000 on 1 January 2010;

(b) $425,000 on 1 January 2011; and

(c) $500,000 on 1 January 2012.

85 Consumer representatives were in favour of an ultimate increase in the compensation cap to $500,000 as this amount was also recommended by the House of Representatives, Standing Committee on Economics, Finance and Public Administration at Recommendation 3 of its *Home loan lending—Inquiry into home loan lending practices and processes used to deal with people in financial difficulty* Report (September 2007). The Standing Committee made this recommendation because it was concerned that the then Banking and Financial Services Ombudsman (now the General banking division of FOS), could not consider all complaints related to loans that were guaranteed by property.

86 Where guarantees are involved:

(a) consumer representatives submitted that there should be no minimum cap (i.e. the amount that can be claimed should be limitless); and

(b) COSL submitted that the minimum compensation cap should be higher than $280,000.

87 One financial industry association also sought further clarification of ASIC's policy on high value claims as claims up to $560,000 could potentially be considered by the scheme, even if a minimum compensation cap of $280,000 was awarded.

ASIC's response:

We have decided to require EDR schemes to operate a minimum compensation cap of $280,000, and to the extent that insurance brokers are covered by the scheme, a minimum compensation cap of $150,000, at this time for claims that meet the value of the retail client test under s761G of the Corporations Act (currently $500,000).

For instance, a claim that is greater in value than $500,000 will not fall within the jurisdiction of the scheme.

A claim that involves $500,000 or less, however, may be able to be handled by a scheme, but the scheme will only be able to award compensation up to the compensation cap (i.e. $280,000 or more if the scheme adopts a capped amount that is greater than the required minimum of $280,000, and to the extent that insurance brokers are covered by the scheme, $150,000 or more).

We are of the view that schemes should be able to handle complaints that meet the value of the retail client test under s761G, because when the dispute resolution requirements were introduced under the Corporations Act, EDR schemes were intended to handle the complaints of retail investors. This is reflected in the dispute resolution provisions under s912A and s1017G.

We consider that a minimum compensation cap of $280,000 (and to the extent that the scheme handles complaints about insurance brokers, $150,000) should be adopted because we do not consider that current differential monetary limits (including in particular the limit for investment complaints in the ILIS division of FOS) are adequate in terms of being consistent with the nature, extent and value of consumer transactions in particular industries.

By setting a minimum compensation cap we can ensure adequate scheme coverage for complaints and consistency of scheme coverage across comparable industry sectors.

We note that this does not preclude schemes from introducing a cap that is higher than the minimum $280,000, or $150,000 where the scheme covers insurance brokers, at this time, should they wish to do so.

We have decided to grant a special exemption to schemes to the extent they cover insurance brokers so they will be required to operate a minimum compensation cap of $150,000 at this time as:

- the deeming provisions under s985B, Corporations Act afford some consumer protection by clarifying when an insurance broker's liability is discharged in an intermediary situation; and
- complaints involving high value amounts would generally be against the insurer and not the insurance broker.

We do not consider it necessary to require a higher than $280,000 minimum compensation cap for guarantees at this stage. However, if possible, we encourage, EDR schemes to adopt a higher than $280,000 compensation cap in respect of guarantees.

We recognise the potential difficulty for AFS licensees in securing PI insurance. We have therefore decided to introduce a close to three-year transitional period (i.e. until 1 January 2012) to enable PI insurers and financial service providers to adjust to this new requirement.

We discuss our approach to transitional periods further in Section M.

H Awarding interest in addition to an EDR scheme compensation award

Key points

Submissions were strongly divided on whether interest should be claimable in addition to the compensation cap amount.

We have decided to:

- permit schemes to award interest or earnings in addition to the compensation cap; and
- require that, if interest is awarded, it should be calculated from the date of the cause of action or matter giving rise to the claim.

Our proposal

88 We proposed that consumers and investors should be entitled to claim interest *in addition* to compensation up to the EDR scheme's compensation cap. In other words, an award of interest by a scheme could lead to the amount of compensation awarded being over the cap.

89 Currently, the schemes do not have a consistent approach to how they award interest. Only the ILIS division of FOS, COSL and FCDRS specify their approach to awarding interest.

90 Currently:

(a) the ILIS division of FOS cannot make an award of interest that exceeds $50,000, but this is in addition to amounts awarded under the monetary limit; and

(b) COSL and FCDRS specify that they can make an award of interest, but this will be included in the amount awarded under the compensation cap and within the monetary limit respectively.

91 Table 4 summarises the current approach of schemes to awarding interest.

Table 4: EDR scheme approaches to awarding interest

EDR scheme	Approach to interest
Banking and finance division, FOS	**no specific reference**
General insurance division, FOS	**no specific reference**

EDR scheme	Approach to interest
Investments, life insurance and superannuation division, FOS	Interest may be awarded by a Panel or Adjudicator and may be claimed/awarded on top of monetary limits (Clauses 13.2 and 34, ILIS division Terms of Reference) **The amount of interest awardable is limited:** The total amount of interest awarded must not exceed $50,000 (Clauses 34.1 and 34.2, ILIS division Terms of Reference). Except in the case of a disability income policy the total amount of interest awarded must not exceed the *lesser* of $50,000 or five times the monthly benefit under the policy (Clause 34.1, ILIS division Terms of Reference). **Rate of interest:** The rate of interest that applies depends on the type of complaint : • for·disputed claims under a life insurance policy—the rate must not exceed the prescribed rates under s 57 of the *Insurance Contracts Act 1984* (Cth) (Clause 34.1, ILIS division Terms of Reference); and· • all other complaints that do not relate to disputed claims under a life insurance policy—the rate not exceeding the average of those monthly 10 year Treasury bond yield rates for the months in respect of which interest is to be paid to the extent those rates are available form the Reserve Bank of Australia at the time payment is made (Clause 34.2, ILIS division Terms of Reference). **Matters that may be considered when determining an award of interest:** When determining the period over which interest should be awarded or the appropriate rate of interest and methods of calculation, the Panel/Adjudicator may have regard to '*any factors it considers relevant, including but not limited to the extent to which the conduct of either the complainant or the member has contributed to delay*.' (Clause 34.3, ILIS division Terms of Reference).
Mutuals division, FOS	**no specific reference**
Insurance brokers division, FOS	**no specific reference**

EDR scheme	Approach to interest
COSL	The complainant can claim compensation for loss that is direct loss/other indirect or non-financial loss or disadvantage as the Board specifies as recoverable from time to time and publishes on COSL's website (Rule 32, COSL's Rules). Under COSL's guidelines, interest on the 'loss' and interest accrued on unreleased loan funds not forwarded to the complainant may be recovered in limited circumstances as an 'indirect loss' (Guideline 8.3, COSL). In relation to 'opportunity cost', the Board has made the specification that in some circumstances the Board may award compensation that is/includes 'opportunity cost'. In assessing the amount of compensation for opportunity cost, COSL may assess the amount as interest on the money. **Rate of interest:** The interest rate usually applied is the bank term deposit rate for the amount of money the complainant has not had access to because of the conduct of the member.
FCDRS	Where a consumer claims an 'opportunity cost', compensation may be assessed as interest on the sum which is claimed to be lost (Guideline 4.1.1.3.4, FCDRS) **Rate of interest:** The term deposit rate for the amount of money which the consumer has been denied access to will be applied (Guideline 4.1.1.4.2, FCDRS)

92 We proposed that interest should be awarded in addition to the compensation cap because:

(a) this may act as an incentive for all parties to, in good faith, genuinely attempt to resolve the complaint more expeditiously; and

(b) in some circumstances an award of interest in addition to the compensation cap may be appropriate, particularly in order to compensate the complainant for loss on a principal sum.

Awarding interest in addition to the scheme's compensation award

93 Submissions were almost equally divided on whether interest should be claimable in addition to the compensation cap. Most of the major financial industry associations opposed this proposal, preferring that interest be awarded as part of any compensation award.

94 A number of submissions also made comments on how an EDR scheme should award interest. These comments included:

(a) FICS Rule 34, now Rule 34 of the ILIS division of FOS (see Table 4) should continue to apply;

(b) interest should be awarded where it is fair and reasonable, taking into account all the circumstances;

(c) if interest is awarded, it should be limited to a reasonable time frame—ideally from the date of loss to the date of submitting a complaint to the EDR scheme;

(d) any entitlement to interest needs to take into account any unreasonable delay on the part of the complainant in lodging the complaint, particularly if there will be a six-year time limit for lodging a complaint (e.g. a $280,000 complaint could accumulate $14,000 interest per annum (which adds up to $84,000 *before* being compounded)); and

(e) there should be a direct link between interest and the act/omission that is the subject of the complaint. Otherwise there may be a potential blow-out in costs which defeats the purpose of a compensation cap.

95 Two industry submissions also sought further information from ASIC:

(a) about ASIC's policy rationale in relation to this proposal; and

(b) clarification as to the rates to be applied or the method of calculation of interest to be adopted by the EDR schemes and whether there will be consistency across schemes.

ASIC's response:

We have decided to:

- permit schemes to be able to award interest or earnings *in addition* to the compensation cap; and
- require that if interest is awarded that it should be calculated from the date of the cause of action or matter giving rise to the claim.

In some circumstances, an award of interest in addition to the compensation cap may be appropriate, particularly in order to compensate the complainant for loss on a principal sum.

We are of the view that interest should be awarded in addition to and not included within the compensation cap because this may act as an incentive for all parties to genuinely attempt to resolve the complaint more expeditiously.

We have decided to require that if interest is awarded, it should be calculated from the date of the cause of action or matter giving rise to the claim because this approach is consistent with the approach adopted by most Australian courts (i.e. state/territory Supreme Courts and the Federal Court of Australia), as well as the statutory Financial Ombudsman Service in the UK. This approach also accommodates industry feedback that interest should be limited by a reasonable time frame.

We also consider this approach to be most appropriate because an award of interest calculated from the date of the cause of action or matter giving rise to the claim may act as an incentive for a financial service provider to genuinely attempt to deal with the complaint as expeditiously as possible not only throughout IDR, but also during EDR.

In the interests of flexibility and schemes being able to make awards of interest that are fair and just in all the circumstances, we do not consider it necessary to prescribe any further, as to how interest should be calculated nor applied.

This is because legislation relating to a particular industry segment may prescribe further whether a particular interest rate or method of calculation should be applied (e.g. s57 of the *Insurance Contracts Act 1984* (Cth)).

We note the concern that if interest is capable of being awarded in addition to the compensation cap, any unreasonable delay on the part of any party should be taken into consideration. While we do not wish to prescribe further how interest should be calculated, we note the ILIS division of FOS' approach to the scheme decision maker being able to take into account any factors considered relevant, including but not limited to the extent to which the conduct of either the complainant or the member has contributed to delay when awarding interest. We consider this to be a reasonable approach, should the schemes wish to adopt this.

I EDR: Complaints where a member ceases to carry on business

Key points

Most submissions supported our proposal to require EDR schemes to handle complaints where a member ceases to carry on business.

We have decided to require all EDR schemes to ensure that their Constitution and/or Terms of Reference:

- allows them to exercise a discretion about whether or not to cancel the scheme member's membership and/or to handle complaints where the scheme member ceases to carry on business, ceases to have a licence or becomes insolvent under administration, with regard to factors including the complainant's interests; and
- allows them to exercise a discretion to bypass IDR processes, where it is in the complainant's interests to do so, including where complaints are no longer being handled at IDR.

Our proposal

96 We proposed requiring all EDR schemes to have jurisdiction to handle complaints about a financial service provider that was a scheme member when the complaint was made, but which subsequently ceases to carry on business.

97 Currently, the schemes have different approaches to complaints where a member ceases to carry on business.

Table 5: EDR scheme approaches to handling complaints where the member ceases to carry on business

EDR scheme	Approach to handling complaints where the member ceases to carry on business
Banking and Finance division, FOS	Membership is immediately terminated if the scheme member ceases to carry on business or loses its licence/authorisation (Clause 3.9, FOS Constitution). The division cannot deal with complaints where the entity is not a member at the time the complaint is made (Clause 14.1, Banking and finance division Terms of Reference)

EDR scheme	Approach to handling complaints where the member ceases to carry on business
General insurance division division, FOS	Membership is immediately terminated if the scheme member ceases to carry on business or loses its licence/authorisation (Clause 3.9, FOS Constitution). *The Terms of Reference only apply to disputes between applicants and members who were members at the time the complaint arose (Clause 4.1, General insurance division Terms of Reference).*
Investments, life insurance and superannuation division, FOS	Membership is immediately terminated if the scheme member ceases to carry on business or loses its licence/authorisation (Clause 3.9, FOS Constitution). The division cannot deal with complaints against an entity which is not a member of the service at the time the complaint is made (Clause 14.1, ILIS division Terms of Reference).
Mutuals division, FOS	Membership is immediately terminated if the scheme member ceases to carry on business or loses its licence/authorisation (Clause 3.9, FOS Constitution). **No specific reference in the Mutuals division Terms of Reference**.
Insurance brokers division, FOS	Membership is immediately terminated if the scheme member ceases to carry on business or loses its licence/authorisation (Clause 3.9, FOS Constitution). **No specific reference in the Insurance brokers division Terms of Reference.**
COSL	Scheme membership immediately ceases where the scheme member: • if it is a company, becomes 'externally administered', having the same meaning under the Corporations Act; or • if it is an individual, becomes 'insolvent under administration', having the same meaning under the Corporations Act (Clause 9.3(a), Constitution). COSL may deal with a complaint received by it before the date on which the member ceased to be a member under COSL's Constitution (Rule 139, COSL Rules).
FCDRS	Membership ceases when the member is no longer an 'approved financial institution', i.e. a Credit Union, Building Society or financial service provider (Rule 3.8, FCDRS Rules).

Complaints where a member ceases to carry on business

98 Most submissions supported this proposal.

99 Of those who supported this proposal, some expressed concern that funding of the scheme's service should not be subsidised by existing or remaining members. Others noted that there may also be practical difficulties in implementing this proposal (e.g. it may be difficult to properly investigate the complaint).

100 The reasons cited for supporting this proposal included:

(a) there is a need for consistent treatment across all financial products and services and the divergent processes are currently confusing for consumers; and

(b) EDR services should be provided to all customers.

101 Consumer representatives agreed that EDR schemes should have jurisdiction over complaints about a financial service provider that was a scheme member when the complaint was made, but subsequently ceases to carry on business. Consumer representatives also submitted that a last resort compensation scheme should also be established so that consumers can access the compensation scheme when an award in their favour is unpaid.

102 The few submissions which disagreed with this proposal did so on the basis that it is not fair for a financial service provider to pay for the bad management of another provider that goes out of business and it offends the principle of procedural fairness for an EDR scheme to make an award without the involvement of the scheme member as there is little efficacy in doing so.

ASIC's response:

We have decided to require all EDR schemes to ensure that their Constitution and/or Terms of Reference:

- allows them to exercise a discretion about whether to cancel the scheme member's membership and/or to handle complaints where the scheme member ceases to carry on business, ceases to have a licence or becomes insolvent under administration, with regards to factors, including where it is in the complainant's interests; and
- allows them to exercise a discretion to bypass IDR processes, where it is in the complainant's interests to do so, including where complaints are no longer being handled at IDR .

We have decided to adopt this approach as ASIC's regulatory experience has found that not being able to access an EDR scheme where the scheme member ceases to carry on business can leave consumers and investors without any means of recourse, particularly where consumers and investors are unable to take legal action because they have already lost all their funds.

We note the concerns raised about the practical difficulties involved in a scheme handling such complaints and clarify that in exercising its discretion to cancel the scheme member's membership and/or handle complaints, the scheme may consider:

- whether the general exclusions to the scheme having jurisdiction apply;
- whether the time limits for bringing a complaint to EDR apply (discussed at Section J); and
- whether the coverage of the scheme precludes the scheme from handling the complaint (discussed at Sections E, F and G).

We consider that this approach will benefit consumers and investors as they may be able to obtain redress and in insolvency situations, a scheme decision may assist in showing that a complainant is a creditor and has a 'proof of debt'.

We also consider that this approach will give schemes the flexibility to spend time and resources on handling complaints, where the consumer would be benefited.

We consider that being able to bypass IDR requirements will be in the complainant's interests where the scheme member is no longer handling complaints at IDR.

J Time limit for bringing complaints to an EDR scheme

Key points

Submissions were divided on whether ASIC should introduce a six-year time limit for bringing complaints from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss.

We have decided to adopt a two-tiered approach, so that the time limit for bringing a complaint to an EDR scheme will be:

- six years from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss; or
- two years from when the financial service provider provides a 'final response' at IDR, as discussed in Section D.

These time limits will apply, unless the scheme finds that there were exceptional circumstances and/or the member agrees to the scheme having jurisdiction.

Our proposal

103 We proposed that all EDR schemes should introduce a six-year time limit for bringing complaints and that this time limit should commence from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss.

104 This approach is consistent with the approach adopted by courts in comparable situations: see for example, s5 (breach of contract), *Limitations of Actions Act 1958* (Vic).

105 Currently, the schemes adopt different approaches to time limits and the trigger event from which these time limits run. Table 6 summarises each scheme's current approach.

Table 6: Current EDR scheme approaches to time limits

Scheme	Time limit	Trigger mechanism
ILIS division, FOS	6 years	Time starts to run when the complainant knew or should reasonably have known of all the relevant facts (See Rule 14.1(p), ILIS division Terms of Reference)

Scheme	Time limit	Trigger mechanism
Banking and finance division, FOS	6 years	Time starts to run when the event to which the dispute relates occurred. (See Clause 5.5, Banking and Finance division Terms of Reference)
General insurance division, FOS	Statute of limitations	Statue of limitations. (See Clause 8.12, General insurance division Terms of Reference)
Mutuals division, FOS	6 years	Time starts to run when the act or omission to which the dispute relates occurred. (See Paragraph 5.2(f), Mutuals division Terms of Reference)
Insurance brokers division, FOS	Does not provide time limit	**no specific reference**
COSL	6 years	Time starts to run when the earliest act or omission complained of occurred. (See Rule 34(m), COSL Rules)
FCDRS	6 years	Time starts to run when the act or omission to which the dispute relates took place. (See Section 5.10, FCDRS Terms of Reference.)

106 We proposed this approach because we are of the view that harmonising all EDR schemes' Rules/Terms of Reference on time limits for bringing a complaint will deliver consistency for complainants and financial service providers. This approach will also create a more level playing field for industry participants.

107 We acknowledge that this proposal requires EDR schemes to change their Rules/Terms of Reference.

Time limit for bringing complaints to an EDR scheme

108 Submissions were divided on whether ASIC should adopt this proposal.

109 A number of submissions agreed with the proposed six-year time limit, but disagreed on when this time frame should start to run. Industry submissions recommended that the trigger point should instead be:

(a) the date the consumer suffered the loss the complaint is about;

(b) the date of the cause of action; or

(c) when the earliest act or omission complained of occurred. This is because 'or should reasonably have …' can be interpreted differently as it calls for a subjective opinion of when time should start.

110 Consumer representatives agreed with the six-year time limit, but submitted that time should only start to run from:

(a) *the time the consumer knew the financial service provider wanted to enforce the guarantee*. Time should also not start to run against a minor until they have turned 18 years old; and

(b) for all other complaints not relating to a guarantee, *the date the consumer should have reasonably known all the facts relevant to the complaint*.

111 A number of submissions disagreed with the proposed six-year time limit as this would drag out disputes, which would be contrary to the expeditious resolution of complaints. Submissions from the insurance industry also disagreed with the six-year time limit as vehicle and home insurance contracts tend to be annual contracts and such a long time frame would be inappropriate. Other reasons cited for not supporting a six-year time limit included scheme members being disadvantaged due to high staff turnover and the unavailability of assistance when those staff members leave.

112 A significant number of submissions proposed alternative time limits to six years, these alternative time frames were three months (two submissions), 12 months (three submissions), two years (one submission) and three years (one submission).

ASIC's response:

We have decided to adopt a two-tiered approach, so the time frame for bringing a complaint to EDR will be:

1. six years from the date that the consumer or investor first became aware (or should reasonably have become aware) that they suffered the loss; or
2. two years from when the financial service provider provides a 'final response' at IDR as discussed in Section D.

These time limits will apply, unless the scheme finds that there were exceptional circumstances and/or the member agrees to the scheme having jurisdiction.

We have decided to adopt this approach because we are of the view that this may encourage financial service providers to provide a final response in writing, thereby informing consumers and investors of their right to complain to an EDR scheme.

We also consider this approach to be sufficiently flexible to enable access to the scheme where it may be just and equitable to do so.

We are of the view that this approach will also go some way towards addressing industry's concerns about increased costs due to more complaints coming to EDR given our proposals to introduce a compensation cap and that this should be a minimum of $280,000 at this time.

K Excluding complaints already dealt with in another forum

Key points

Submissions generally agreed with our proposal to clarify the meaning of 'dealt with' in another forum for the purposes of schemes being able to exclude these types of complaints from their jurisdiction.

We have decided to adopt a similar approach to Rule 14.1(m) of the ILIS division of FOS' Terms of Reference, and allow an EDR scheme to exclude 'complaints, the subject matter of which has already been dealt with by a court of tribunal or by another ASIC-approved EDR scheme'.

By 'dealt with' we mean, a decision on the merits having been made.

Our proposal

113 SRG 165 explained that schemes may exclude certain types of complaints from their jurisdiction. One such exclusion related to 'complaints that have already been, or should be dealt with in another forum': see SRG 165.87.

114 We proposed to clarify that the meaning of 'complaints that have already been, or should be dealt with in another forum' in SRG 165.87 applies to complaints that have been dealt with in a court, tribunal or another ASIC-approved EDR scheme.

115 We proposed this to allow schemes to exclude complaints that have already been dealt with in another forum so as to address the possibility of consumers and investors taking their complaint to more than one decision-maker. This would cause duplication of resources and run the risk of forum shopping.

116 Our feedback from consumer representatives also suggested that in some cases, EDR schemes may be excluding complaints on the basis that they have been dealt with by an industry code monitoring committee or a state or territory fair trading agency.

117 We are of the view that these types of complaints should not be excluded from the jurisdiction of EDR schemes.

Excluding complaints already dealt with in another forum

118 The majority of submissions agreed with or supported this proposal.

119 Consumer representatives submitted that 'dealt with' should be construed as 'finalised by a reasoned judgment following active consideration of the relevant issues' so as to be careful to exclude a default judgment.

120 This was because consumer representatives are of the view that a default judgment is a binding judgement in favour of the plaintiff (financial service provider) where the defendant (consumer) has not responded to the complaint or appeared before the court. Default judgments are issued despite the consumer having a valid defence, and may be the result of a vulnerable consumer not understanding the court process or their rights to complain to a scheme. Furthermore, default judgments in relation to debts owed to financial service providers are actually sought by third parties (as the debt has been sold), which produces a number of errors and anomalies in that debts that are repaid are sometimes sold and pursued, inadequate information is give to the buyer so that the buyer pursues the whole debt notwithstanding that the consumer has repaid a substantial portion or the total amount. For these reasons, consumer representatives are of the view that EDR schemes should be able to consider a matter even though a default judgment has been entered.

ASIC's response:

We have decided to adopt a similar approach to Rule 14.1(m) of the ILIS division of FOS' Terms of Reference, and allow an EDR scheme to exclude 'complaints, the subject matter of which has already been dealt with by a court of tribunal or by another ASIC-approved EDR scheme'.

By 'dealt with' we mean, a decision on the merits having been made.

We consider that this definition of 'dealt with' will be sufficient to exclude default judgments.

L Publishing information about complaints received and upheld against each member

Key points

Submissions were polarised on whether schemes should be required to publish information about complaints received and upheld against each member in their annual report.

We have decided to require schemes to publish information about complaints received and closed, with an indication of outcome against each member in the scheme's annual report.

Our proposal

121 We proposed that EDR schemes should be required to publish an annual report of statistical information about the number of complaints received and upheld against each member.

122 Our reasons for proposing this was that the number of complaints received by an EDR scheme about a financial services provider and the number of complaints upheld can be an important gauge for consumers and investors when selecting and choosing to remain with a financial services provider.

123 This information is also useful for financial services providers, who may wish to compare their complaints experience against similar businesses.

124 We also made this proposal in the interests of transparency and suggested that this information could be made available on the internet.

125 We recognise that larger providers may experience a greater number of complaints because they have more customers. We would thus expect that EDR schemes will report this information using relevant categorisations, for example size of business or industry sector.

Publishing information about complaints received and upheld against each member

126 Submissions were polarised on whether EDR schemes should publish an annual report of statistical information about the number of complaints received and upheld for each scheme member.

127 Submissions from financial industry organisations and two EDR schemes strongly disagreed with this proposal and seriously questioned the need for this type of data to be published.

128 Another EDR scheme commented that there were difficulties in interpreting the word 'upheld'.

129 Of the industry submissions which strongly disagreed with this proposal, the following were key concerns:

(a) This proposal would unfairly identify larger retail financial service operators and give a *misleading impression* of each operator's complaints history, which would be unreliable and of no use as the number of claims will depend on the size and range of the services provided.

(b) It is *inappropriate and against natural justice* to publicly identify individual members unless extreme breaches have been determined. If this proposal goes ahead, it could lead to antagonism, delayed decisions to participate in EDR based on *brand protection* rather than resolving the dispute and would lead to increased legal representation.

130 One EDR scheme also had concerns about defamation if this proposal was to proceed. This scheme suggested that it would be more appropriate for ASIC to use its notice powers under s33 of the ASIC Act.

131 Of those who supported this proposal, the following reasons were provided:

(a) as EDR schemes stand in place of more formal consumer protection remedies and while they are efficient and effective, they should also remain accountable;

(b) stakeholders, including other members are entitled to be fully informed as to the operation of a scheme and statistical information is a vital part of this process; and

(c) this proposal would result in consistency in reporting across all schemes and divisions within schemes.

132 One submission in support of this proposal even suggested that more detailed data could be made available to members and consumers on the scheme's website.

ASIC's response:

We have decided to require schemes to publish information about complaints received and closed, with an indication of outcome against each member in the scheme's annual report.

We are of the view that the number of complaints closed by an EDR scheme about a financial service provider and an indication of the outcome are important measures for consumers and investors in choosing a financial service provider. It is also useful information for financial service providers to compare their complaints experience against those who operate like businesses.

We do not consider that this approach will give a 'misleading impression' of each member's complaints history, as we expect that the scheme would make every best effort to ensure accuracy of information, categorise its member information according to industry segment and/or size of business and caution that complaints history may vary from time to time and be affected by various influences, such as a complainant's tenacity to pursue their complaint, or natural disasters which may give rise to more insurance claims and therefore more complaints.

We are also of the view that if schemes publish this information in this manner, schemes will not be exposed to actions in defamation, given the information will be contained within the scheme's annual report. As a result, we do not consider it more appropriate for ASIC to use its notice powers under the ASIC Act to obtain this information.

M Transitional arrangements

Key points

Submissions generally agreed that a transitional period was required in relation to our proposals for EDR scheme coverage, but disagreed on the appropriate time frame for a transitional period.

We have decided that for all the changes we are proposing, a transitional period extending until 31 December 2009 will apply.

The only exceptions to this will be the requirement for EDR schemes to operate a minimum compensation cap of $280,000 (and where insurance brokers are covered by the scheme, a minimum compensation cap of $150,000) and the requirement that this compensation cap be indexed. For these proposals we are proposing an almost three-year transitional period, that is a transitional period until 31 December 2011.

Our proposal

133 In CP 102 we stated that we recognised the need for appropriate transitional arrangements for reformulating our guidance on EDR scheme coverage, particularly given the implications our proposal would have for obtaining adequate PI insurance. We called for stakeholders to comment on what they considered to be an appropriate transitional period.

Transitional arrangements

134 Submissions generally agreed that transitional arrangements are required, however, submissions were divided on the appropriate time frame for a transitional period.

135 The majority of submissions recommended a transitional period of two years or more, with the next most popular time frame being 12 months.

ASIC's response:

We have decided that for all the changes we are proposing, a transitional period of until 31 December 2009 will apply to complaints received (to coincide with the new FOS Terms of Reference coming into effect from 1 January 2010).

We anticipate that from 1 January 2010 it will be possible for all of our proposals that relate to the adoption of AS ISO 10002-2006 to have been implemented. We are informed that the Government intends to update the Corporations Regulations that currently refer to AS 4269-1995 this year.

We have decided to make special exception for the requirements that:

- EDR schemes operate a minimum compensation cap of $280,000, and where insurance brokers are covered by the scheme, a minimum compensation cap of $150,000, at this time; and
- compensation caps be indexed.

We propose that these proposals will operate from 1 January 2012 in relation to complaints received (i.e. there will be a transitional period of almost three years).

We are of the view that an almost three-year transitional period is appropriate for industry and PI insurers to adapt to a minimum compensation cap of $280,000, and where insurance brokers are covered by the scheme, a minimum compensation cap of $150,000 and indexation thereafter.

We have formed this view on the basis that this transitional period is two years after all AFS licensees are required to have full PI insurance arrangements in place under RG 126: *Compensation and insurance arrangements for AFS licensees* (i.e. by 1 January 2010).

Appendix 1: Parties who made a public submission to CP 102

Submission no	Stakeholder name/s
Individuals	
1	Bruce Keenan
2	Col Fullagar
Industry organisations	
3	ABACUS Australian Mutuals Pty Ltd
4	The Association of Super Funds of Australia
5	Australian Bankers' Association Inc
6	Australian Compliance Institute
7	Australian Institute of Superannuation Trustees
8	Avant Insurance Limited
9	AXA Asia Pacifica Holdings Limited
10	Deloitte Touche Tohmatsu
11	Financial Planning Association of Australia Ltd
12	Halsey Legal Services Pty Ltd
13	Insurance Council of Australia
14	Investment & Financial Services Association Ltd
15	National Insurance Brokers Association
16	Insurance Australia Ltd t/as NRMA Insurance
17	Securities & Derivatives Industry Association
18	Suncorp Ltd
19	Wesfarmers Insurance Investments Pty Ltd

Submission no	Stakeholder name/s
Consumer representatives	
20	(Joint Consumer Submission) • Australian Financial Counselling and Credit Reform Association· • Civil Justice (Consumer Protection Unit), Legal Aid Queensland· • Consumer Action Law Centre· • Consumer Credit Legal Centre (NSW)· • Consumer's Federation of Australia· • CHOICE· • Financial and Consumer Rights Council· • Financial Counsellors' Association of Queensland· • West Heidelberg Community Legal Service
EDR schemes	
21	COSL
22	FCDRS
23	FOS

Note: The total number of submissions was 24—one submission was confidential.

Key terms

Term	Meaning in this document
AFS license	An Australian financial services licence under s913B that authorises a person who carries out a financial services business to provide financial services. Note: This is a definition contained in s761A.
AFS licensee	A person who holds an AFS licence
AS ISO 10002-2006	The Australian Standard on Complaints Handling,, AS ISO 10002-20006
ASIC	The Australian Securities and Investments Commission
ASIC Act	The *Australian Securities and Investments Commission Act 2001*
Corporations Act	The *Corporations Act 2001* (as amended by the FSR Act) and includes regulations made for the purposes of the Act
EDR scheme or scheme	An ASIC-approved external dispute resolution scheme: see s912A(2)(b) and s1017G(2)(b)
IDR/IDR procedure	Internal dispute resolution procedure: see s912A(2)(a) and s1017G(2)(a)
SRG 139 (for example)	A superseded ASIC regulatory guide (in this example numbered 139)

Related information

Headnotes

AFS licensees; dispute resolution requirements; compensation caps; DIST benchmarks; external dispute resolution; EDR scheme; internal dispute resolution; IDR processes; monetary limits; unlicensed product issuers; unlicensed secondary sellers.

Class orders and pro formas

Class Order [CO 09/339] *Internal dispute resolution procedures*

Class Order [CO 09/340] *External dispute resolution schemes*

Regulatory guides

RG 126 *Compensation and insurance arrangements for AFS Licensees*

SRG 165 *Licensing: internal and external dispute resolution*

Legislation

Australian Securities and Investments Commission Act 2001 (Cth)

Corporations Act 2001 (Cth), s761G, 912A, 985B, 1017G

Insurance (Agents and Brokers) Act 1984 (Cth)

Insurance Contracts Act 1984 (Cth), s57

Limitations of Actions Act 1958 (Vic), s5

Retirement Savings Account Act 1997 (Cth), s47

Superannuation Industry (Supervision) Act 1993 (Cth), s101

Superannuation (Resolution of Complaints) Act 1993 (Cth)

Cases

Australian Timeshare and Holiday Ownership Council Limited v Australian Securities and Investments Commission [2008] AATA 62 (23 January 2008)

Consultation papers and reports

CP 102 *Dispute Resolution—review of RG 139 and RG 165*

Media and information releases

AD08-05 *ASIC proposes new financial services EDR claim limit of $280,000* (Monday 8 September 2008)